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IN THE

SUPREME COURT OF THE UNITED STATES

No. 136

RICHARD H. M. SWANN
and
SUPERVISOR OF ELECTIONS
of Dade County, Florida

Appellants,

vs.

TOM ADAMS, Secretary of State of Florida;
E. L. GATES, Supervisor of Registration of
Broward County, Florida; and
W. B. FREEMAN, Supervisor of Registration of
Monroe County, Florida

Appellees.

BRIEF OPPOSING MOTIONS OF APPELLEES

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Appellees.

BRIEF OPPOSING MOTIONS OF APPELLEES

This brief is submitted by Appellants in response to (a) the Statement of Appellees Opposing Jurisdiction and Motion to Affirm submitted by the Attorney General of Florida, and (b) the Motion of Appellee, W. B. Freeman, Supervisor of Registration of Monroe County, Florida, to Dismiss or To Affirm. The substantive matters traversed in these two pleadings are the same.

I

Appellees contend that the deviations from mathematical equality contained in the Florida Reapportionment Act (House Bill 17-X(66)), herein challenged, are within the undefined outer limits of "substantial" or "approximate" equality, since the Fourteenth Amendment does not require "exact" equality. To reach this conclusion Appellees constantly compare the deviations which will prevail under House Bill 17-X(66) with deviations sanctioned judicially in other states. This side-steps the issue. Nowhere do Appellees compare the deviations in House Bill 17-X-(66) with the smaller deviations of the more perfect plan submitted by Appellants at the express invitation of the District Court and rejected without explanation by the District Court. By their silence Appellees concede that Appellants' plan comes much closer to the standard of an equal voice for each voter, while at the same time meeting all other standards for legislative apportionment articulated by this Court.

While an 18 percent deviation may represent "substantial" or "approximate" equality to a legislative body which in June, 1965, enacted a deviation of 69 percent into law, it represents a denial of equal protection to Appellants because it contains deviations five times as great as are required, as Appellants' plan shows. A plan is constitutional only when it meets the test stated by the District Court on December 23, 1965:

> "... only such minimal departures as necessity demands will be permitted. Variations are to be sanctioned only when they cannot be avoided."

It is unfortunate that the District Court refused to apply its own test.

The Attorney General declares on page 9 of Appellees' motion that the variations in House Bill 17-X (66) occur only in those instances where they cannot be avoided. This statement is refuted by his own silent concession that Appellants' plan is more perfect and Appellants' clear demonstration that in their plan the maximum deviation from equality is 1.95 percent in one house and 3.35 percent in the other house rather than 18.3 percent as contained in House Bill 17-X (66).

II

Both Appellees' motions contend that the Appellants, who are situated in Dade County, have no standing for appellate purposes to challenge the District Court's ruling, since Dade County has virtually equal representation in the House of Representatives and an under-representation of only 5.9 percent in the Senate.[1] Though it is true that there are many counties under or over represented in the legislature to a far greater extent than Dade, Appellants nonetheless believe their standing is clear for the following reasons:

a) Appellant Swann seeks relief not only as a voter of Dade County, but as an urban voter of the State of

[1] The Statement of the Attorney General describes the Senate variation as a 5.9 percent over-representation on page 13 of his motion, but this is a fortuitous error.

Florida. If urban Dade County were over-represented as an individual county in the legislature while urban counties as a whole were under-represented in that legislature, Appellant Swann would be discriminated against and denied equal protection under the Fourteenth Amendment as an urban voter of Florida. If Dade County, with approximately 20 percent of the state's population, were hypothetically given 25 percent of the representation in the Florida Legislature while the remaining 75 percent of the representation was assigned wholly to rural counties, the voters of Dade County and Appellant Swann would be prejudiced and denied equal protection under the law as urban voters of Florida, despite Dade County's individual over-representation in both legislative houses. Every voter in the State of Florida and every voter in Dade County is constitutionally entitled to a properly apportioned legislature, and this entitlement was declared to be an individual personal right by this Court in *Lucas v. Colorado General Assembly*, 377 U.S. 713 at 736, 12 L. Ed. 2d 632, 84 S. Ct. 1472. Thus, the fundamental individual rights of Appellants have been abridged by the malapportionment enacted into law and sanctioned by the District Court; they are denied equal protection under the law as urban voters and therefore possess standing to prosecute this appeal.

b) The District Court, since the institution of this case in 1962, has followed a uniform policy of denying all motions to intervene as a party in the cause, including such motions from residents of counties in many parts of the State, other than Dade County. The notice setting final hearing on March 15, 1966 even excluded amici curiae from oral argument. Since it was therefore impossible for

a plaintiff from any other county in the State to protest against House Bill 17-X(66), Appellants addressed the Court on the general issue of constitutionality on behalf of all the voters of the State of Florida. This is made clear in the transcript of the argument:

"JUDGE JONES: Dade County is not unhappy with its own situation?

MR. BRITTON: Not in the sligh[t]est, your Honor. Under that program, in the House there is a disproportion of over five percent which we think to be totally needless. But, certainly, not invidiously discriminatory under any decision of the Court.

JUDGE JONES: And Dade County is just motivated by higher moral principles in wanting everybody else in the state to be as well treated as it has been.

MR. BRITTON: The interest is more selfish, your Honor, than that. I know of no reason why a citizen of Polk County could not come in after this Court adopts the legislature's plan and attack it in another Court proceeding. If it did, this case which had its beginning four years ago, would be prolonged perhaps for another year needlessly.

Apart from that selfish interest that I feel as a citizen here and I believe my fellow citizens feel, I do feel that it is our responsibility before

you to urge the correct, the sound, the proper legal solution to you regardless of which way it affects us.

JUDGE JONES: Well, do not misunderstand me. I was not critical. I just want to get your position clear." (Transcript, pp. 12-13)

By reason of the District Court's action in denying any intervention, Appellants are perforce the representatives of all Florida voters. It is therefore their duty and their right to assert and protect the interest of all Florida voters, including those resident in Dade County.

c) Although this is designated as a new appeal, in essence it is but a continuation of the two prior appeals in which this Court ruled favorably to Appellants. Appellants are basically seeking enforcement of the two prior opinions and judgments entered by this Court in their favor; they have standing to maintain this appeal on that ground alone.

d) Under the plan jointly proposed and submitted to the District Court by Appellants, Dade County was under-represented by 0.71 percent in the Senate and over-represented by 1.22 percent in the House of Representatives. Under House Bill 17-X(66) Dade County is under-represented by 5.9 percent in the Senate and by 0.4 percent in the House. The voters of Dade County and Appellant Swann are therefore under-represented to a greater extent under House Bill 17-X(66) than they would be under the joint plan proposed by Appellants. On this basis also, they have the legal standing to maintain this appeal.

III

Appellees misunderstand the argument contained in that portion of the Jurisdictional Statement entitled "Abuse of Discretion." Appellants do not contend that the legislature which enacted House Bill 17-X(66) was an illegal legislature incapable of enacting any legislation; rather they contend that that legislature was illegally apportioned and that its reapportionment enactments are therefore not entitled to the presumption of validity customarily accorded legislative enactments when these are attacked in a court. House Bill 17-X(66) was adopted by a legislature apportioned in accordance with a 1963 plan under which 14.5 percent of the people could elect a majority of the Senate and 27.4 percent of the people could elect a majority in the House of Representatives—a plan held unconstitutional by this Court in 1964, two years before this enactment. How then can Appellees assert that House Bill 17-X(66) meets Appellees' noble phrase "an expression of the will of the people of the State of Florida through their Legislature." All that happened was that an illegally apportioned legislature enacted a plan which, though admittedly much closer to constitutional requirements than previous failures, still failed to meet the constitutional standard requiring the closest possible approximation to mathematical equality.

All Appellants contend is that the merits and not the authorships of the three plans submitted to the District Court should have formed the basis for the District Court's decision.

CONCLUSION

For the reasons stated, this Court has jurisdiction of this action and should reverse the order below and order the District Court to reapportion the legislature of the State of Florida in the manner advocated by the Appellants in their joint plan of July 6, 1965.

Respectfully submitted,

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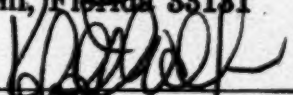

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